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William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: CS Docket No. 95-178, *Definition of Markets for Purposes of the  
Cable Television Mandatory Television Broadcast Signal Carriage  
Rules -- Reply to Opposition to Petition for Reconsideration*

Dear Mr. Secretary:

On behalf of Blackstar of Ann Arbor, Inc. ("Blackstar"), and pursuant to Section 1.429 of the Commission's Rules, I enclose herewith for filing an original and eleven (11) copies of Blackstar's "Reply to Opposition to Petition for Partial Reconsideration and/or Clarification" in the above-captioned proceeding.

Please stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this material to the undersigned.

Respectfully submitted,



Eric T. Werner

Enclosures

cc: Mr. John Oxendine  
Mr. Ed Parker  
Mr. Chris Webb  
Erwin G. Krasnow, Esquire

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C. 20554

In the Matter of )  
)  
Definition of Markets for ) CS Docket No. 95-178  
Purposes of the Cable Television )  
Mandatory Television Broadcast )  
Signal Carriage Rules )

TO: The Commission

**REPLY TO OPPOSITION TO PETITION  
FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION**

BLACKSTAR OF ANN ARBOR, INC. (hereinafter "Blackstar"), licensee of Station WBSX(TV), Channel 31, Ann Arbor, Michigan (the "Station"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g) (1995), hereby submits its Reply to the "Opposition of the National Cable Television Association, Inc." filed August 8, 1996 ("Opposition") in response to Blackstar's Petition for Partial Reconsideration and/or Clarification ("Petition") in the above-captioned proceeding.<sup>1/</sup>

**I. INTRODUCTION**

In the *ADI Report and Order*, the Commission acknowledged that transition to a new local television market definition methodology was necessary in order to respond to the Arbitron Company's decision to vacate the local television market research field. In light of the fact that Arbitron would no longer be publishing the Area of Dominant Influence ("ADI") profiles that had formerly governed market definitions for purposes of the FCC's must-carry rules, the Commission decided it would adopt instead the Designated Market Area ("DMA") designations published by Nielsen Media Research. However, concerned that an immediate transition to the DMA framework

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<sup>1/</sup> *Report and Order and Further Notice of Proposed Rulemaking* in CS Docket No. 95-178, FCC 96-197, released May 24, 1996 ("ADI Report and Order"). The summary of the *Report and Order* appeared in the Federal Register on June 10, 1996. 61 FED. REG. 29312 (June 10, 1996).

would cause disruptions for cable subscribers, the Commission decided to defer the change until the triennial must-carry/retransmission consent election cycle in 1999 and, in the meantime, continue to use Arbitron's ADI framework. However, the Commission did not address whether stations should or would be permitted to employ updated Arbitron information if it were available.

In its Petition, Blackstar asked the Commission to revisit its *ADI Report and Order* to clarify that -- consistent with the Commission's established policy of using updated market information for each successive must-carry election cycle -- broadcast stations will be permitted to utilize such updated Arbitron ADI market designations for the upcoming 1996 must-carry election where reliable evidence exists to substantiate such redesignations. Falsely characterizing Blackstar as advocating an "across-the-board revision[] to the rules," the National Cable Television Association ("NCTA") contends, in essence, that Blackstar's grievance is a "discrete issue" inappropriate for resolution in a rulemaking proceeding. Instead, NCTA asserts, Blackstar must rely solely on the petition for special relief process to redress the effects of its erroneous ADI designation.

As demonstrated herein, neither of NCTA's arguments hold any merit and, most significantly, NCTA has not even attempted to rebut Blackstar's core argument, namely, that refusal to permit broadcasters to rely on such updated market information would be arbitrary and irrational and would constitute an unwarranted and unexplained departure from existing agency policy. Accordingly, NCTA's arguments should be rejected and the Commission should grant Blackstar's requested relief.

## **II. DISCUSSION**

### **A. Longstanding FCC Policy Supports Blackstar's Request to Permit Broadcasters to Rely on Updated Arbitron ADI Designations for the 1996 Must Carry/Retransmission Consent Election Where Reliable Evidence Exists to Substantiate the New Designation**

In the Petition, Blackstar briefly discussed the history of the Commission's must-carry rules following the enactment of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Specifically, Blackstar identified how, from the very inception of the

Commission's rules implementing the must-carry provisions of the 1992 Cable Act, the agency had consistently and unequivocally stated its intention to update ADI assignments at three-year intervals to coincide with broadcasters' triennial must-carry/retransmission consent elections both in its order adopting the must-carry rules,<sup>2/</sup> and in the text of the rules themselves.<sup>3/</sup>

As observed in the Petition, the Commission continued to embrace this policy in its *ADI Report and Order*. Petition at 6. In deciding ultimately to adopt DMAs as the new framework for television market definition, the Commission expressly rejected cable advocates' arguments that the Commission should fix in stone the 1991-1992 ADI designations stating that ". . . we continue to believe that our 1993 decision to use updated market designations for each election cycle to account for changing markets is appropriate." *ADI Report and Order*, *supra* note 1, slip op. at 20.

NCTA's Opposition entirely ignores this point. Indeed, NCTA fails even to suggest a basis upon which the Commission could rationally deviate from the course it charted three years ago. As Blackstar emphasized in the Petition, none of the reasons cited by the Commission for delaying the transition to DMAs affected in any way the agency's policy favoring use of updated market data. Accordingly, to the extent that -- notwithstanding Arbitron's decision to cease publishing the annual *Market Guide* -- reliable, more current evidence from Arbitron exists which demonstrates a different

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<sup>2/</sup> Petition at 5-6 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2975 ¶ 39 (1993) (*Report and Order* in MM Docket No. 92-259) [hereinafter "*Report and Order*"]). In the *Report and Order*, the Commission stated

We will establish a scheme whereby ADI designations will be set for a three-year period designed to coincide with the three-year election time frame for the must-carry/retransmission consent election. We believe that this procedure will allow us to take into account changing markets while at the same time providing stability for the affected parties. As suggested by INTV, the current list of ADIs [Arbitron's 1991-1992 *Television Market Guide*] will be in effect for the initial election period. For the next election period in 1996, we will use the list published in the Spring of 1995; for the election in 1999, the applicable list of ADIs will be the one published in the Spring of 1998, etc. . . .

*Report and Order*, 8 FCC Rcd at 2975 ¶ 39 (emphasis added, footnote omitted).

<sup>3/</sup> Petition at 5 (citing 47 C.F.R. § 76.55(e) at Note).

ADI designation than that reflected in the 1991-1992 *Market Guide*, broadcasters should be entitled to rely upon it for the 1996 election. For the Commission now to deny Blackstar and other broadcasters this right would constitute an arbitrary unwarranted departure from existing policy.<sup>4/</sup>

**B. Contrary to NCTA's Assertion, The Instant Rulemaking Presents an Entirely Appropriate Vehicle for the Relief Blackstar Requests**

NCTA's primary objection to the Petition -- *i.e.*, its claim that Blackstar's complaint is a "discrete" issue which "do[es] not warrant . . . across-the-board revision[]" to the rules. . . ."<sup>5/</sup> -- falters for two reasons: First, it depends upon a fallacious characterization of Blackstar's requested relief. In point of fact, Blackstar has not requested an "across-the-board revision[]" to the rules." To the contrary, as the Petition makes clear, Blackstar has requested only a narrow modification of the Commission's *ADI Report and Order* to clarify that the Commission's decision to defer adoption of Nielsen DMAs for another three years does not change in any way its existing policy to permit broadcasters to utilize updated Arbitron ADI market information for the 1996 must-carry election while Arbitron continues to be the governing market-definition paradigm. In short, Blackstar asks the Commission only to reaffirm a policy which is already expressly set forth in the Commission's rules -- hardly an "across-the-board revision" to the rules.

Second, to the extent it implicitly suggests that the instant rulemaking is an inappropriate procedural vehicle for granting Blackstar the relief it requests, NCTA's argument also fails. Contrary to NCTA's evident belief, Blackstar is not asking the Commission in the instant Petition for an adjudication of its particular rights and interests. Rather, just as does the underlying rule set forth in

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<sup>4/</sup> Such a change of course would be particularly arbitrary and capricious in view of the fact that cable operators as well as broadcasters had anticipated being subject to any revised market designations made by Arbitron. Thus, rigidly freezing the 1991-1992 ADI designations even for the three years of the 1996 election period would confer an inequitable and unjustified benefit upon cable systems who may continue to deny broadcasters carriage.

<sup>5/</sup> Opposition at 3.

the *ADI Report and Order*, the reconsideration or clarification that Blackstar has requested would have general application to all similarly situated parties.

That the requested clarification would operate to remedy Blackstar's quandary is of little moment. The fact remains that there may exist other stations which confront an inequitable situation similar to that faced by Blackstar's Station WBSX: While the number of such stations may not be especially great, it seems unlikely that Blackstar would be the only licensee to be caught on the horns of the Commission's decision to use the 1991-1992 ADI listings for the 1993 must-carry election cycle and Arbitron's subsequent decision to cease publishing that *Market Guide* prior to the 1996 election. Under the Commission's stated policy, even such a small group of stations should be afforded the opportunity to correct their predicament where they possess credible evidence that Arbitron would have redesignated them to another ADI.

Moreover, even in the unlikely event that Blackstar proved to be the only party so, the Commission nevertheless could -- and should -- proceed by rulemaking. First, as noted above, the action taken by the Commission would be one of general application to an open class of affected parties the membership of which is as yet undetermined. Second, even if Blackstar were the only affected licensee, it is not the only affected or interested entity. To the contrary, other affected or interested groups include members of the public who, presently denied cable access to Station WBSX, would be able to receive the Station's signal if Blackstar were awarded the must-carry rights to which a designation in the Detroit ADI would entitle it. Similarly, other television stations and cable systems in the market stand potentially to be affected by the relief requested as well.<sup>6/</sup> Courts have repeatedly held that rulemaking is an appropriate mechanism to accommodate the interests of all concerned interests. *See, e.g., Quivira Mining Co. v. U.S. Nuclear Regulatory Comm'n*, 866 F.2d

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<sup>6/</sup> However, in this regard it is significant that no potentially-affected television station or cable system in the Detroit ADI has opposed the instant Petition for Reconsideration. Moreover, to the extent such entities may be affected by the clarification Blackstar requests, their position is no different than they might have expected following the adoption of the must-carry rules in 1993 when the Commission first stated that it would use updated market data in 1996.

1246, 1261-62 (10th Cir. 1989); *Hercules Incorporated v. Env. Protection Agency*, 598 F.2d 91, 118 (D.C. Cir. 1978)

**C.     The Special Relief Process Is Inefficient and May Not Afford Complete Relief to Broadcasters Confronting Blackstar's Dilemma**

Finally, in lieu of rulemaking, NCTA states that Blackstar can obtain a remedy through the petition for special review process. However, contrary to this claim, the Section 614(h) modification process cannot afford Blackstar or other similarly-situated parties the full measure of relief which they would receive under the proposed clarification. First, as NCTA is well aware, the Section 614(h) scheme is primarily intended to effect narrow, specific corrections to a station's market at the margins. Operating on a community-by-community basis, the special relief process becomes cumbersome and inefficient when applied to the instant problem of adding entire regions on a wholesale basis.

Second, the criteria used for such particularized market modification under Section 614(h) create a certain circular dilemma of their own which make the special relief process an ineffective remedial vehicle, to wit: whether a particular community will be added to a station's market for must carry purposes depends in large measure on whether the station in question has a history of carriage on the cable systems serving that community. In circumstances such as those facing Station WBSX, where the station in question has been historically denied carriage on cable systems in certain communities as a consequence of its erroneous ADI designation, the special relief proceeding affords little hope for having those communities added to its market.<sup>7/</sup>

Finally, the special relief process is also equally inefficient for cable operators. The clarification requested by Blackstar would permit broadcasters simply to move from one ADI to another based upon reliable evidence from Arbitron -- thereby subjecting a new group of cable operators to must-carry obligations but relieving the obligations of those in the former ADI.

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<sup>7/</sup> Indeed, it is for this reason that Blackstar limited its Petition for Special Relief, cited Opposition at 3 n.10, only to those communities within the Detroit ADI whose cable systems do presently carry Station WBSX.

However, in sharp contrast, the special relief process presumes that the station should remain in the inappropriate ADI and seek to have additional communities outside of its ADI added. The process thereby disadvantages those cable systems in the station's existing inappropriate ADI by holding them hostage to must-carry obligations which rightly belong to other operators in the adjacent ADI. For this reason as well, the instant rulemaking proceeding provides a more suitable forum for resolution of the issue raised by Blackstar's Petition.

### **III. CONCLUSION**

FOR THE FOREGOING REASONS, Blackstar respectfully requests that the Commission reject NCTA's Opposition and reconsider its decision in the *ADI Report and Order* and clarify that where reliable, updated Arbitron information is available which affects the ADI designation of a particular broadcast station, the station will be permitted to rely on that updated information for purposes of the approaching 1996 must-carry election.

Respectfully submitted,

**BLACKSTAR OF ANN ARBOR, INC.**

By:



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Dated: August 21, 1996

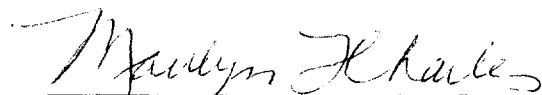


**CERTIFICATE OF SERVICE**

I, Marilyn L. Charles, a secretary with the law firm of Verner, Liipfert, Bernhard,  
McPherson and Hand, Chartered, hereby certify that on this twenty-first (21st) day of August, 1996,  
a copy of the foregoing "Reply to Opposition to Petition for Partial Reconsideration and/or  
Clarification " was mailed, first class postage prepaid to the following:

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